Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

NO. 76-1173

ALVIN KLEIN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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ALVIN KLEIN,
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v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Your petitioner, Alvin Klein, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit entered in the above captioned case.

OPINIONS BELOW

An opinion was rendered by the United States Court of Appeals for the Sixth Circuit in this matter. Said opinion, affirming the district court's judgment of conviction, is not yet reported but is set forth herein at Appendix A. The court of appeals' order denying the petition for rehearing is not yet reported but is set forth herein at Appendix B. No opinion was rendered by the district court.

JURISDICTION

The opinion and order of the United States Court of Appeals for the Sixth Circuit was filed on December 21, 1976. A petition for rehearing was denied on January 26, 1977. Pursuant to Rule 22 of the Rules of this Honorable Court, the within Petition for Writ of Certiorari is being filed within thirty (30) days after the entry of the court of appeals' final order.

The jurisdiction of this Honorable Court is invoked under Title 28, United States Code, Section 1254(1).

QUESTIONS PRESENTED

I. Whether the trial court erred in sentencing petitioner by imposing a five year sentence on count one of the indictment and a consecutive five year sentence on count three of the indictment since the offenses charged in these counts merge and thus separate punishment may not be imposed. *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180 (1932)?

II. Whether the trial court abused its discretion by refusing to allow the production of transcripts of testimony before the indicting grand jury, or to review these transcripts *in camera,* in order to determine if any evidence was presented or if the indicting grand jury was merely "briefed" on what occurred before the investigating grand jury?

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution of the United States provides as follows:

> No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATUTES INVOLVED

Rule (5) (c) of the Federal Rules of Criminal Procedure provides as follows:

> *(c) Offenses Not Triable by the United States Magistrate.* If the charge against the defendant is not triable by the United States magistrate, the defendant shall not be called upon to plead. The magistrate shall inform the defendant of the complaint against him and of any affidavit filed therewith, of his right to retain counsel, of his right to request the assignment of counsel if he is unable to obtain counsel, and of the general circumstances under which he may secure pretrial release. He shall inform the defendant that he is not required to make a statement and that any statement made by him may be used against him. The magistrate shall also inform the defendant of his right to a preliminary examination. He shall allow the defendant reasonable time and opportunity to consult counsel and shall admit the defendant to bail as provided by statute or in these rules.
>
> A defendant is entitled to a preliminary examination, unless waived, when charged with any offense, other than a petty offense, which is to be tried by a judge of the district court. If the defendant waives preliminary examination, the magistrate shall forthwith hold him to answer in the district court. If the defendant does not waive the preliminary examination, the magistrate shall schedule a preliminary examination. Such examination shall be held within a reasonable time but in any event not later than 10 days following the initial ap-

pearance if the defendant is in custody and no later than 20 days if he is not in custody, provided, however, that the preliminary examination shall not be held if the defendant is indicted or if an information against the defendant is filed in district court before the date set for the preliminary examination. With the consent of the defendant and upon a showing of good cause, taking into account the public interest in the prompt disposition of criminal cases, time limits specified in this subdivision may be extended one or more times by a federal magistrate. In the absence of such consent by the defendant, time limits may be extended by a judge of the United States only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interest of justice.

As amended Feb. 28, 1966, eff. July 1, 1966; April 24, 1972, eff. Oct. 1, 1972.

Rule 6(e) of the Federal Rules of Criminal Procedure provides as follows:

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occuring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

Title 18, United States Code, Section 2 provides as follows:

§ 2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. As amended Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

Title 18, United States Code, Section 371 provides as follows:

§ 371. Conspiracy to commit offense or to defraud United States

If two or more conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy,

each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Title 18, United States Code, Section 1341, provides as follows:

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

As amended May 24, 1949, c. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub.L. 91-375, § 6(j)(11), 84 Stat. 773.

Title 18, United States Code, Section 1952 provides as follows:

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity.

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are

committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub.L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498 and amended Pub.L. 91-513, Title II, § 701(i)(2), Oct. 27, 1970, 84 Stat. 1282.

STATEMENT OF THE CASE

History

On April 28, 1975, your petitioner, Alvin Klein, was indicted at criminal number 75-097L in the United States District Court for the Western District of Kentucky. The indictment named six co-defendants and charged these individuals with a total of fifteen counts which alleged various violations of Title 18, United States Code, Sections 2, 371, 1341 and 1952. Count one alleged that from June 1, 1969 to April 28, 1975 in the Western District of Kentucky and elsewhere, Klein and his co-defendants unlawfully conspired and agreed to violate 18 U.S.C. §§1341 and 1952, i.e., 1) to travel in interstate commerce with intent, and thereafter perform acts, to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of the unlawful activity of arson; and 2) to use the United States mails in furtherance of a scheme to defraud and by means of fraud to obtain money from certain insurance companies, all in violation of 18 U.S.C. §371. Counts two, three, four, five and six alleged that from

May 1, 1970 to May 3, 1970 in the Western District of Kentucky, Klein and his co-defendants did travel and caused certain co-defendants and others to travel in interstate commerce with intent, and thereafter perform acts, to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of the unlawful activity of arson, all in violation of 18 U.S.C. §§2 and 1952. Counts seven, eight, nine, ten, eleven, twelve, thirteen, fourteen and fifteen alleged that from June 1, 1969 to April 28, 1975 in the Western District of Kentucky and elsewhere, Klein and his co-defendants: 1) devised a scheme to defraud and by means of fraud to obtain money from certain insurance companies by means of false pretense, representations and promises; and 2) for the purpose of executing the aforesaid scheme to defraud, did knowingly cause the United States Post Office Department to deliver by mail certain letters to and from insurance companies, all in violation of 18 U.S.C. §§2 and 1341.

Prior to trial co-defendants Merrill H. Klein, Merle Gottlieb and Hobart Darling entered pleas of guilty. A jury trial of the indictment against co-defendants Alvin Klein, Ivan Marra and James Fife was convened before the Honorable Rhodes Bratcher, District Judge, on October 6, 1975. On October 17, 1975, the jury found Alvin Klein guilty as charged on ten counts of the indictment (counts one, two, three, four, seven, eleven, twelve, thirteen, fourteen and fifteen) and not guilty as charged on five counts of the indictment (counts five, six, eight, nine and ten).

On October 31, 1975, a Judgment and Commitment Order was entered sentencing Alvin Klein to serve five years as to count one and five years as to count three

(to be served consecutively) and five years each as to counts two, four, seven, eleven, twelve, thirteen, fourteen and fifteen (to be served concurrently, each with the other, and concurrently with the sentences imposed as to counts one and three). Klein was also ordered to pay a $7,500.00 fine as to each of counts one and three for a total fine of $15,000.00.

The judgment of sentence was affirmed by the United States Court of Appeals for the Sixth Circuit on December 21, 1976; a petition for rehearing was denied on January 26, 1977. The within Petition for Writ of Certiorari follows.

FACTS

A.

The principal facts established through the testimony and exhibits presented by the Government are as follows:

From June 1, 1969 to May 9, 1973, the building located at 1400-1406 West Broadway Avenue, Louisville, Kentucky ("the building"), was owned or controlled by Vienna Baking Company, Inc., and its wholly owned subsidiary, Dixie Baking Company, Inc., said corporations or businesses being entities in which petitioner Alvin Klein had a financial interest. From June 14, 1968 to June 14, 1971, the building was insured against loss by fire by the Hartford Insurance Group under a policy issued to Alvin Klein and Burton Klein doing business as Vienna Baking Company in the amount of $400,000. On May 4, 1970, a fire occurred on the premises resulting in the destruction of the building's interior; it was opined that the fire was intentionally set.

Hobart Darling, a co-defendant who had plead guilty in this case prior to trial and who was incarcerated in federal prison for another matter at the time, met in 1969 with co-defendants Merrill Klein (not related to Alvin Klein) and Merle Gottlieb, both of whom had also plead guilty in this case, and planned the arson destruction of the building. Alvin Klein consented to the plan and provided $20,000. in cash to Darling for payment to Merrill Klein who was to arrange the fire. Alvin Klein promised an additional $20,000 after the fire which Darling did receive and deliver to Merrill Klein.

In January, 1970, Dixie Baking Company leased the building in Louisville, Kentucky to the Palomar Tool Company, a business venture owned and controlled by co-defendant Ivan Marra, who also plead guilty in this case. Marra and Merrill Klein planned to establish a business in the building, burn it, and then receive money from the phony insurance claims on their destroyed inventory. On April 3, 1970, Marra obtained from the Fireman's Fund Insurance Company a policy of insurance in the name of Marra Industries covering the contents of the building against loss by fire in the amount of $115,000. Marra and Merrill Klein procured phony billings, invoices and receipts in order to inflate the value of the building's contents.

On May 4, 1970, Merrill Klein and others under his direction set fire to the building. Several days later, Carl Luick, who was aware of the planned fire and had been referred by Darling and Merrill Klein, was hired by Alvin Klein to act as the public adjustor on the claim for the losses resulting from the fire. Luick also undertook to represent Marra in regard to his claims. Con-

cerning both claims, Luick forwarded by mail various correspondence and documents including final Proofs of Loss to the insurance companies involved. Alvin Klein's claim was for $395,195. while Marra's claim totaled $115,000. Subsequently, Alvin Klein discharged Luick. The final settlement with Hartford Insurance Company on the building itself was effected through Alvin Klein's attorney after litigation had commenced and Hartford was completely satisfied that the name insured (Alvin Klein) had not caused or brought about the fire; the settlement figure was only $160,000. which caused a "big loss" to Alvin Klein. Marra's claim was never paid by Fireman's Fund Insurance Company because Marra was unable to prove his loss.

B.

The main points of the testimony and exhibits presented by petitioner Alvin Klein are as follows:

Alvin Klein denied ever meeting with anyone or participating in any discussion concerning the planning of a fire at his building in Louisville, Kentucky. He did not agree to have the building burned, nor did he pay anyone to do it. Klein first learned of the fire on the day after it occurred; he was extremely upset at this news. He was shocked when arson was recited as a defense by Hartford during the course of the litigation involving his company's claim for damages to the building. The fire proved to be a real disaster for Alvin Klein, his brother Burton and their company; after the claim was settled, total company and personal obligations on the destroyed property for the Kleins totaled approximately $490,000.

Attorney Arthur Bloom represented the Kleins in regard to their claim and effected the final settlement with Hartford. The end result of the fire loss was a serious drain on the Kleins' personal and corporate finances.

C.

Additional relevant facts will be set forth in detail, where appropriate, in the argument amplifying the reasons relied on for the allowance of the writ.

REASONS FOR GRANTING A WRIT OF CERTIORARI

I.

In the court of appeals, petitioner Klein argued that the trial court erred in sentencing him by imposing a five year sentence on count one of the indictment and a consecutive five year sentence on count three of the indictment since the offenses charged in these counts merge and thus separate punishment may not be imposed. The court of appeals rejected this argument. Klein now contends that the court of appeals' decision is in conflict with an applicable decision of this Honorable Court, *Blockburger v. United States,* 284 U.S. 299, 52 S.Ct. 180 (1932).

On October 13, 1975, Klein was sentenced as follows:

> "FIVE YEARS as to Count 1 of the Indictment, FIVE YEARS as to Count 3 of the Indictment, said sentences to be served consecutively, each to the other, for a total sentence of TEN YEARS. IT IS FURTHER ORDERED AND ADJUDGED that the defendant is committed to a FINE of $7,500.00 as to each of Counts 1 and 3 of the Indictment, for a total fine of $15,000.00 to be paid by the defendant.
>
> "IT IS FURTHER ORDERED AND ADJUDGED that the defendant be committed to the custody of the Attorney General or his authorized representative for a period of FIVE YEARS as to each of Counts 2, 4, 7, 11, 12, 13, 14, and 15 of the Indictment, said sentences to be served concurrently, each with the other, and concurrently with the sentences imposed this date in Counts 1 and 3 of the Indictment, for a TOTAL SENTENCE OF TEN YEARS to be served by the defendant."

Count one of the indictment states in pertinent part:

> "The Grand Jury charges:
>
> "1. That beginning on or about June 1, 1969, and continuing thereafter up to the date of the filing of this indictment, in the Western District of Kentucky and elsewhere, IVAN L. MARRA, MERRILL H. KLEIN a/k/a Morris Klein, MERLE GOTTLIEB, HOBART DARLING, JAMES E. FIFE a/k/a "Jay" Fife, and ALVIN KLEIN, the defendants herein, and others known and unknown to the Grand Jury, did knowingly and unlawfully conspire, combine, confederate and agree together and with each other and with diverse others to the Grand Jury known and unknown to commit certain offenses against the United States, to-wit:
>
> "Violations of Title 18, United States Code, Section 1952 and Section 1341; that is to say, they conspired and agreed to travel in interstate commerce with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, to wit, Arson, in violation of the laws of the Commonwealth of Kentucky, and thereafter performed acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of said unlawful activity, to wit, Arson . . .

"7. It was further a part of the conspiracy that defendants MERRILL H. KLEIN a/k/a Morrie Klein, IVAN L. MARRA, JAMES E. FIFE a/k/a "Jay" Fife, and others would and did travel and cause to travel on various occasions during the period of this indictment between the state of Pennsylvania and the Commonwealth of Kentucky and between the state of Ohio and the Commonwealth of Kentucky and between the Commonwealth of Kentucky and the state of Indiana for the purpose of making preparations for the intentional destruction of the aforesaid premises by fire and for the additional purpose of procuring the intentional destruction of the aforesaid premises by fire . . ."

Count three of the indictment states:

"The Grand Jury further charges:

1. On or about May 2, 1970, in the Western District of Kentucky, IVAN L. MARRA, MERRILL H. KLEIN a/k/a Morrie Klein, MERLE GOTTLIEB, HOBART DARLING, JAMES E. FIFE a/k/a "Jay" Fife, and ALVIN KLEIN, the defendants herein, did travel and cause travel in interstate commerce by defendant MERRILL H. KLEIN a/k/a MORRIE KLEIN, from Pittsburgh in the Commonwealth of Pennsylvania to Louisville in the Commonwealth of Kentucky with the intent to promote, manage, establish and carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity being arson in violation of the laws of the state of Kentucky, and thereafter did perform and attempt to perform acts to promote, manage, and carry on and facilitate the promotion, management and carrying on of said unlawful activity.

In violation of Title 18, United States Code Sections 1952 and 2."

The fifteen counts of the instant indictment charge multiple offenses arising out of a single transaction, i.e., the destruction by fire of the building located at 1406 West Broadway Avenue, Louisville, Kentucky on May 4, 1970. In determining whether separate punishment might be imposed for each of these counts, this Court in *Blockburger v. United States,* 284 U.S. 299, 304, 52 S.Ct. 180, 182 (1932), held that courts must examine the offenses charged to ascertain ". . . whether each provision requires proof of a fact which the other does not".

". . . As *Blockburger* and other decisions applying its principle reveal, see e.g. *Gore v. United States,* 357 U.S. 386, 78 S.Ct. 1280, 2 L.Ed. 2d 1405 (1958); *American Tobacco Co. v. United States,* 328 U.S. 781, 788-789, 66 S.Ct. 1125, 1128-1129, 90 L.Ed. 1575 (1946), the Court's application of the test focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes. See *Gore v. United States, supra* . . ." *Iannelli v. United States,* 420 U.S. 770, 785, 95 S.Ct. 1284, 1293-1294, footnote #17 (1975).

In the instant case, petitioner Klein believes that the *Blockburger* test is satisfied in favor of his position that the offenses charged in counts one and three of the indictment merge and thus separate punishment is prohibited.

Under the *Blockburger* test, each of the two specific offenses alleged against Klein in counts one and three does *not* require proof of a fact that the other does not. Count one alleges that Alvin Klein conspired and agreed to violate 18 U.S.C. §1952, i.e., he conspired and agreed to travel in interstate commerce with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of the unlawful activity of arson. Count one further alleges that after Klein so conspired and agreed he then ". . . performed acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of said unlawful activity, to wit, arson . . .". Finally, for the purpose of the within argument, count one (in paragraph seven) alleges that co-defendants and co-conspirators Merrill H. Klein, Ivan Marra and James E. Fife and others would and did travel and cause to travel on various occasions during the period recited in this indictment between Pennsylvania and Kentucky, between Ohio and Kentucky, and between Kentucky and Indiana for the purpose of preparing for the destruction of, and then destroying, the building at 1406 Broadway Avenue, Louisville, Kentucky. There are two elements necessary to prove the existence of this conspiracy: 1) an agreement between two or more persons to act together in committing an offense, and 2) an overt act in furtherance of the conspiracy. *United States v. Falcone,* 311 U.S. 205, 61 S.Ct. 204 (1940). Here, the Government's evidence did show Alvin Klein's agreement with his co-conspirators to travel (or cause others to do so) in interstate commerce for an unlawful purpose (arson) and his performance of overt acts to promote this

purpose. It also showed that co-conspirators Merrill H. Klein, Marra and Fife (whose actions are attributable to co-conspirator Alvin Klein) did in fact travel extensively in and between Pennsylvania, Ohio, Kentucky and Indiana to effect this illegality.

Count three alleged that on May 2, 1970, Alvin Klein violated 18 U.S.C. §§2 and 1952[1] by causing, or aiding and abetting, Merrill H. Klein's travel in interstate commerce from Pennsylvania to Kentucky to promote the unlawful activity of arson. In order to sustain a conviction for aiding and abetting under 18 U.S.C. §2, the accused must have knowledge of the criminal plan and must consciously share in the criminal act. *Nye & Nissen v. United States,* 336 U.S. 613, 69 S.Ct. 766 (1949). Here, these two elements are contained in both the specific charge against Alvin Klein in count one of the indictment and the evidence presented by the Government on that charge. Here, the evidence of the agreement involving Alvin Klein and the overt acts pursuant thereto actually prove the aiding and abetting of travel. In short, the offense of aiding and abetting in count three does not require proof of a fact that the offense of conspiracy in count one does not require. The participants in the substantive offense in count three are all the same co-conspirators who are a party to the conspiracy alleged in count one. The acts of Alvin Klein

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1. Count three only charges Alvin Klein with the specific offense of *aiding and abetting* under 18 U.S.C. §2. The evidence shows that co-defendant Merrill Klein actually performed the act of traveling while the other co-defendants performed acts to "cause" or "aid and abet" that travel.

which are offered to prove the substantive offense in count three are the same as those offered to prove the conspiracy in count one. To prove the aiding and abetting charges against Alvin Klein, the Government did not have to establish any fact which was not already established to prove the conspiracy charge against him. The very same evidence was relied upon to prove both charges. Therefore, under *Blockburger,* the conspiracy and the substantive offense as they relate to Alvin Klein merge upon proof of the former, and separate punishment is thus prohibited.

The court of appeals held against Klein and cited *Blockburger, Iannelli* and *United States v. Austin,* 529 F.2d 559 (6th Cir. 1976). In its opinion, the applicable standard of review was set forth as follows:

> "The substantive offenses do not require an agreement whereas the conspiracy does. There may be conviction and punishment both for a conspiracy and for aiding and abetting in commission of a substantive offense so long as the 'separate offense' test of *Blockburger* is met. *Pereira v. United States,* 347 U.S. 1 (1954)." Opinion, p. 5 (see Appendix, p. 5a).

Petitioner Klein respectfully suggests that when the above standard or test is applied to the facts of the instant case, a result different from that reached here should ensue.

It is respectfully suggested that the court of appeals' decision in *Austin,* which relies in part on this Court's holding in *Gavieres v. United States,* 220 U.S. 338, 31 S.Ct. 421 (1911), is supportive of Klein's position rather than distinguishable. There it was held:

> "The test to be applied to determine whether the offenses are separate or essentially congruent is the 'same evidence' test. As the Supreme Court has held, whenever it appears that the proof of one offense proves every essential element of another growing out of the same act, the Fifth Amendment limits the punishment to a single act. *Gavieres v. United States,* 220 U.S. 338, 343, 31 S.Ct. 421, 55 L.Ed. 489 (1911)." *United States v. Austin, supra,* 529 F.2d at 562-563.

Here, under the particular facts and circumstances, the proof of the conspiracy proves every essential element of the substantive offense of aiding and abetting, which offense grows out of the same act involved in the conspiracy offense. As in *Austin,* ". . . essentially the same evidence in this case was relied upon to prove both the conspiracy count and the substantive offense(s)". 529 F.2d at 563. Here, as in *Austin,* the substantive offense charged in count three ". . . in effect charged the same agreement or concert of action," 529 F.2d at 563-564, on the part of Klein and others, as charged in count one.

Therefore, petitioner Klein contends that a correct application of this Court's reasoning in *Blockburger* and *Gavieres* makes clear that petitioner's five year sentence on count one and his consecutive five year sentence on count three are improper and in violation of the Fifth Amendment which limits the punishment to a single act under the circumstances of the instant case.

II.

Petitioner Klein poses an important question of federal law which has not been, but should be, settled by this Court. He asks this Court to determine whether a trial court should allow the production of transcripts of testimony before the indicting grand jury, or to review these transcripts *"in camera"*, in order to determine if any evidence was presented or if the indicting grand jury was merely "briefed" on what occurred before the investigating grand jury.

Prior to trial, petitioner Alvin Klein, pursuant to Rule 6 (e) of the Federal Rules of Criminal Procedure[2], moved the district court for disclosure of the grand jury transcript of each witness who testified before the grand juries involved in the instant case concerning the events alleged in the indictment. One of the express reasons for said motion was:

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2. Rule 6(e) reads, in pertinent part, as follows:

"(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court *preliminary to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.* No obligation of secrecy may be imposed upon any person except in accordance with this rule." Emphasis supplied.

> "It is the defendant's understanding that the grand jury which returned this indictment is not the grand jury which took testimony and heard witnesses in this case, and defendant believes that the indicting grand jury was 'briefed' as to the proceedings which occurred before the investigating grand jury. These facts give rise to the possibility of prosecutorial misconduct before the grand jury and impermissible selection of material, thus preventing the grand jury from exercising its power and duty independently to investigate and examine evidence and request additional testimony and/or witnesses."

On September 9, 1975, without a hearing, the district court denied said motion. On September 29, 1975, again prior to trial, Klein renewed his motion. It was averred that no witnesses had appeared before the grand jury sitting in Louisville, Kentucky, and that this grand jury had returned an indictment based solely upon a "briefing" by the prosecuting attorneys as to what had been presented to the grand jury in Pittsburgh, Pennsylvania which had actually conducted the investigation surrounding the instant case. Klein requested an evidentiary hearing or an *"in camera"* judicial review of the proceedings before the indicting grand jury. Said request was not granted. In light of the particular facts and circumstances here, Klein contends that the denial of his motion and the lower court's failure to order an evidentiary hearing or *"in camera"* review of the indicting grand jury proceedings was so serious an abuse of discretion as to deprive him of his rights to a fair trial and due process of law under the Fifth Amendment to the United States Constitution.

It should be noted that petitioner Klein does not allege there was no *competent* evidence presented to the indicting grand jury in Louisville as was the allegation in *United States v. Hoffa,* 349 F. 2d 20, 43 (6th Cir. 1965), affd. 385 U.S. 293, 87 S.Ct. 408 (1966). Klein's position is that there was *no* evidence presented to the indicting grand jury and, consequently, no basis for the return of a valid indictment. In *Hoffa,* it was held that "[h]earsay evidence is sufficient", 349 F. 2d at 43, to support an indictment. In *Costello v. United States,* 350 U.S. 359, 362, 76 S.Ct. 406, 408 (1956), Mr. Justice Black wrote:

> "But neither the Fifth Amendment nor any other constitutional provision prescribes the *kind of evidence* upon which grand juries must act." (Emphasis supplied).

As *Hoffa* and *Costello* both imply and as no court has held to the contrary, some evidence of some type must be presented before a grand jury can hand up an indictment. See also: *United States v. Calandra,* 414 U.S. 338, 344-345, 94 S.Ct. 613, 618 (1974). The concurring opinion in *Costello* strongly supports this view. In it, Mr. Justice Burton reasoned:

> "Likewise, it seems to me that if it is shown that the grand jury had before it no substantial or rationally persuasive evidence upon which to base its indictment, that indictment should be quashed. To hold a person to answer to such an empty indictment for a capital or otherwise infamous federal crime robs the Fifth Amendment of much of its protective value to the private citizen." 350 U.S. at 364, 76 St.Ct. at 409.

Mr. Justice Burton went on to quote from the lower court opinion. There, in Judge Learned Hand's majority opinion, it was announced:

> "We should be the first to agree that, if it appeared that no evidence had been offered that rationally established the facts, the indictment ought to be quashed; because then the grand jury would have in substance abdicated." *United States v. Costello,* 221 F. 2d 668, 677 (2d Cir. 1955).

From the above, it is clear that some evidence, however slight, must be offered to the indicting grand jury. Here, Klein alleged the total absence of any evidence. It is submitted that a report or summarization of testimony heard by the investigating grand jury in Pittsburgh can not fill this void.

Due to the seriousness of Klein's allegation, the lower court should have ordered an evidentiary hearing or reviewed a transcript of the Louisville grand jury proceedings *"in camera"*. If the court had acceded to Klein's request, it would not have acted without support. In *Hoffa,* the trial judge required the production of the grand jury minutes for *"in camera"* inspection as a result of defendants' desire to use them for impeachment purposes. The Eighth Circuit has stated in *Truchinski v. United States,* 393 F. 2d 627, 634 (8th Cir. 1968):

> "This is not to say that a defendant upon timely motion cannot demonstrate a 'particularized need' for at least the Court's in camera examination of grand jury minutes to determine if defendant's motion to dismiss the indictment is well taken."

Further support can be found in the Second Circuit's decision in *United States v. Estepa,* 471 F. 2d 1132 (2d

Cir. 1972) where the indictment was dismissed because the nature of the case's presentation to the grand jury failed to avoid undue reliance upon hearsay. In addition to showing an appellate court's willingness to "look behind" an indictment, ***Estepa*** is also significant for its reasoning. The court pointed out that:

> "The importance of avoiding undue reliance upon hearsay before a grand jury is heightened by this circuit's view that an indictment constitutes a finding of probable cause and avoids the need for a preliminary hearing under F.R. Cr.P. 5(c)." 471 F.2d at 1136.

This language bolsters the view that there must be some evidentiary basis for an indictment since an indictment serves to demonstrate a grand jury's conclusion that probable cause exists to charge a particular individual with a violation of law.

Klein respectfully suggests that this Court adopt a procedure akin to that ordered by the Second Circuit in *United States v. Ramirez,* 482 F.2d 807, 812 (2d Cir. 1973). There, based on *Estepa,* the court ruled that where it appears the grand jury has heard only hearsay testimony, upon appropriate motion, the proper course for the trial judge to follow is to examine the grand jury minutes *"in camera"* to determine whether or not the grand jury was misled into believing it was given eyewitness testimony when in fact it was not. Quaere: is it not at least equally important, if not more so, to have the trial judge, in the appropriate circumstances, determine whether or not the indicting grand jury had heard any testimony at all? Here, the lower

court should have examined the minutes to determine whether the indictment was based on any evidence presented to the Louisville grand jury.

As noted above, judicial precedent requires that an indictment rest upon some evidence. Without review of the Louisville grand jury proceedings, neither Klein nor the lower court could discover whether this requirement was met. If it was not, the prejudice to Klein is clearly manifest for several reasons. First, the indictment against him would be invalid and unfounded. Second, the grand jury will have been only a "rubber stamp" endorsing the wishes of a prosecutor without the opportunity to evaluate the credibility of witnesses contrary to the requirement that an individual be indicted by a grand jury so as to place between the prosecutor and the accused an independent body, which can evaluate the evidence and decide if the charge is grounded in reason. *Wood v. Georgia,* 370 U.S. 375, 390, 82 S.Ct. 1364 (1962). Third, the accused Klein would be denied his rights ". . . to have the grand jury make the charge on its own judgment". *Stirone v. United States,* 361 U.S. 212, 219, 80 S.Ct. 270, 274 (1960).

In rejecting Klein's argument, the Sixth Circuit viewed the statement by his counsel that it was his "understanding" that the indicting grand jury was not the grand jury which heard witnesses in the case as ". . . a mere conclusion of the defendant without any factual support" (Opinion, pp. 3-4, Appendix, p. 4a). That court went on to say:

> "Actually the chief witness for the government testified twice at the trial that he appeared before the grand jury in Louisville. We conclude that the defendant made no showing of the existence of

> grounds for a motion to dismiss the indictment and that the district court did not abuse its discretion in denying the motion." (Opinion, p. 4, Appendix, p. 4a)

Petitioner Klein respectfully suggests that by reasoning in such a manner the court of appeals misapprehended certain points of law and fact. Initially, it should be noted that the secrecy of grand jury proceedings precluded Klein from offering "factual support" for his motion; the facts were simply not available to him. Moreover, the trial court refused to grant an evidentiary hearing on this question and/or to review the grand jury minutes *"in camera"*. Even though it would appear reasonable and fair for the burden of going forward to shift to the Government when a defendant raises a contention like the one raised here, this also was not done. It was thus impossible for Klein to offer supportive information. He had sincerely alleged to the court his belief that the indicting grand jury did not hear witnesses but had only been "briefed" as to the proceedings which occurred before the investigating grand jury. Because of the rules of grand jury secrecy and absent the benefit of a hearing or an *"in camera"* review, his allegation could not be expanded upon.

That petitioner's allegation was sufficient is impliedly supported by the language of Rule 6 (e) of the Federal Rules of Criminal Procedure which permits disclosure of grand jury minutes ". . . at the request of the defendant upon a showing that grounds *may exist* for a motion to dismiss the indictment because of matters occurring before the grand jury" (emphasis supplied). The Rule does not require absolute certainty, only a possibility. Here, that criterion was met. Furthermore,

under the circumstances, disclosure of the minutes was not necessary to satisfy Klein's request; judicial *"in camera"* review would have been sufficient. As discussed above, such a procedure is certainly not without precedent.

Finally, while it is true that a Government witness testified twice at trial of his appearance before the indicting grand jury, it does not necessarily follow that any evidence was presented to that body concerning petitioner Klein. The record is devoid of any mention of such evidence. At trial, that Government witness did not implicate petitioner Klein. At trial, only one witness, Hobart Darling, testified to any involvement by Klein in the crimes charged, but there is no indication that Darling either appeared before, or offered testimony to, the indicting grand jury. In fact, there is no evidence of any witness testifying against Klein before the indicting grand jury.

CONCLUSION

For the reasons discussed above, petitioner Klein requests a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

THOMAS A. LIVINGSTON
DENNIS J. CLARK

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee,
v.
JAMES E. FIFE and ALVIN KLEIN,
Appellants.

No. 76-1366
No. 76-1367

APPEAL from the United States District Court for the Western District of Kentucky.

Decided and Filed December 21, 1976.

Before: PHILLIPS, Chief Justice; MCCREE and LIVELY, Circuit Judges.

LIVELY, Circuit Judge. The appellants, Fife and Klein, were indicted by a grand jury of the Western District of Kentucky for conspiring to travel in interstate commerce for the purpose of committing arson and of conspiring to use the mails to defraud. They were also indicted in six substantive counts charging violations of 18 U.S.C. § 1952, interstate travel for the purpose of committing arson, and eight substantive counts of violating 18 U.S.C. § 1341, use of the mails to defraud. Both appellants were convicted of the conspiracy charge and three substantive counts of interstate travel to commit arson as well as charges of mail fraud. A co-defendant, Ivan Marra, pled guilty during the trial to the conspiracy count and one substantive count of interstate travel to commit arson. Each appellant was sentenced to serve five years on count one, the conspiracy count, and five years on one of the substantive counts,

to be served consecutively to the conspiracy sentence; each was sentenced to serve concurrent sentences on the remaining substantive counts.

A building in Louisville, Kentucky in which the appellant Klein had a financial interest burned on May 4, 1970. There was abundant evidence of arson. The building was insured against loss by fire by the Hartford Insurance Group, and Klein eventually received $160,000 from Hartford in settlement of the fire claim. The co-defendant Marra made a claim against Fireman's Fund Insurance Company for loss to the contents of the building under a policy he had obtained upon representation to Fireman's Fund that he was conducting a plastics business as lessee of the building. The evidence disclosed that Marra had moved some materials into the building to give the impression that a business was being conducted, but that actually this was not the case. Fireman's Fund never paid Marra on his claim. The arrangements for the fire and the actual setting thereof involved trips between Pennsylvania and Kentucky by the defendants and others acting in concert with them, and the mails were used in filing loss claims with the insurance companies. Neither appellant questions the sufficiency of the evidence.

APPEAL OF ALVIN KLEIN (No. 76-1367)

Klein made a motion under Rule 6(e), Fed. R. Crim. P., for production of the grand jury minutes, charging that the indicting grand jury had not heard witnesses, but had actually only been "briefed" by government agents concerning evidence which had been presented to an earlier grand jury in the Western District of Pennsylvania. Following denial of this motion Klein requested the district court to conduct an *in camera* examination of the Kentucky grand jury transcript. Seeking to distinguish *Costello v. United States,* 350 U.S. 359 (1956), and this court's decision in *United States v. Hoffa,* 349 F.2d 20 (1965), aff'd, 385 U.S. 293 (1966), he argues that it is his contention that there was no evidence presented to the indicting grand jury, not that the evidence presented to the grand jury was hearsay or otherwise incompetent. He concedes that a motion under Rule 6(e) is addressed to the sound discretion of the trial judge, but maintains that there was an abuse of discretion in denying the motion in this case.

The Court of Appeals for the Second Circuit reversed a conviction and dismissed an indictment where a witness before a grand jury testified extensively about a drug transaction and the grand jury was not informed that the testimony was based on hearsay and was misled to believe that the witness was testifying from personal knowledge. *United States v. Estepa,* 471 F.2d 1132 (2d Cir. 1972). Thereafter the Second Circuit held that when it appears that a grand jury had heard only hearsay testimony, on motion, the district judge should examine the grand jury minutes *in camera. United States v. Ramirez,* 482 F.2d 807 (2d Cir.), *cert denied sub nom. Gomez v. United States,* 414 U.S. 1070 (1973). Both *Estepa* and *Ramirez* were addressed to a practice of the United States Attorney's Office for the Southern District of New York from which the court concluded that grand juries were being misled by the use of hearsay witnesses rather than eyewitnesses and that in some cases there was a high probability that the grand juries would not have returned indictments if eyewitness testimony had been presented. It is not contended that such a situation existed in the present case.

The requirement of Rule 6(e) is that the defendant must make "a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." In the absence of such a showing, the proceedings of a grand jury are required to be kept secret. *United States v. Wilkinson,* 513 F.2d 227 (7th Cir. 1975); *Truchinski v. United States,* 393 F.2d 627 (8th Cir.), *cert. denied,* 393 U.S. 831 (1968).

In his motion before the district court counsel for the defendant Klein stated that it was his "understanding" that the grand jury which had returned the indictment was not the grand jury which had heard the witnesses in the case. This was a mere conclusion of the defendant without any factual support. Actually the chief witness for the government testified twice at the trial that he had appeared before the grand jury in Louisville. We conclude that the defendant made no showing of the existence of grounds for a motion to dismiss the indictment and that the district court did not abuse its discretion in denying the motion. *United States v. Barnes,* 313 F.2d 325, 326 (6th Cir. 1963).

Klein next contends that count one (conspiracy) and count three (interstate travel for the purpose of committing arson) of the indictment charged him with identical offenses and that the counts therefore merged, precluding separate punishment on the two counts. Count three charged that Klein caused travel in interstate commerce by one of the actual arsonists and he maintains that this is precisely the same as one of the overt acts with which he is charged under count one. The government argues that Klein's contention is undercut by the settled principle that a person may be convicted both of a substantive offense and a conspiracy to commit the same substantive offense.

The test for determining if an indictment charges one offense or separate offenses was established by the Supreme Court in *Blockburger v. United States,* 284 U.S. 299, 304 (1932). In *Iannelli v. United States,* 420 U.S. 770, 785 (1975), the Court pointed out that there may be a "substantial overlap" in the proof offered to support two charges but that the *Blockburger* test is satisfied so long as "each requires proof of a fact that the other does not . . . ." In *United States v. Austin,* 529 F.2d 559 (6th Cir. 1976), the indictment was drawn in such a way that the substantive offenses "in effect charged the same agreement or concert of action . . ." involving the defendant and other persons as was charged in the conspiracy count. Under these circumstances we held that there was a merger of offenses. The indictment in the present case is not drawn in the same way as the indictment which the court considered in *Austin.*

Of course the essence of a conspiracy is an agreement to commit an offense. A conviction under count one required proof of an agreement. Count three, on the other hand, charged interstate travel and causing interstate travel by the arsonist. The fact that the offenses charged in the substantive counts all related to a single event which was the ultimate purpose of the conspiracy is immaterial. The substantive offenses do not require an agreement whereas the conspiracy does. There may be conviction and puishment both for a conspiracy and for aiding and abetting in commission of a substantive offense so long as the "separate offense" test of *Blockburger is met. Pereira v. United States,* 347 U.S. 1

(1954). Essentially the same arguments as those made by Klein in this case were considered by the court in *United States v. Bradley,* 421 F.2d 924, 927-28 (6th Cir. 1970), where the court stated:

> The commission of a substantive offense and a conspiracy to commit it are separate and distinct crimes, and a plea of double jeopardy does not arise on a conviction for both. Pinkerton v. United States, 328 U.S. 640, 643, 644, 66 S.Ct. 1180, 90 L.Ed. 1489; Pereira v. United States, 347 U.S. 1, 11, 74 S.Ct. 358, 98 L.Ed. 435 (1953); Callanan v. United States, 364 U.S. 587, 590, 81 S.Ct. 321, 5 L.Ed.2d 312 (1960). Neither does a conviction for a substantive offense in any way merge a conspiracy charge into the substantive crime. Callanan v. United States, *supra,* 364 U.S. at 587, 81 S.Ct. 321. In *Pereira, supra,* 347 U.S. at 11, 74 S.Ct. 358, the Court specifically held that aiding and abetting, under the facts of that case, was a separate crime from conspiring. We can find no meaningful distinction in the facts presented here.

The other issues raised by Klein do not require extended treatment. He contends that it was an abuse of discretion for the district court to exclude evidence that he had submitted to a polygraph test and that Hartford had relied upon it in settling his insurance claim. This court has recently reiterated its position that the result of a polygraph test is not competent evidence. *United States v. Mayes,* 512 F.2d 637 (6th Cir.), *cert. denied,* 422 U.S. 1008 (1975) and *sub nom. Cook v. United States,* 423 U.S. 840 (1975). Since polygraph evidence itself would have been incompetent, there was no abuse of discretion in excluding testimony that a polygraph

test had been taken. Klein contends further that the district court committed prejudicial error in admitting testimony that the occupation of Merrill Klein (no relation to appellant) was that of "arsonist." His argument on this point seems basically concerned with the fact that the District Judge ruled similar evidence inadmissible at an earlier stage of the proceedings. However, at the time the evidence was admitted there had been a great deal of testimony concerning arson and the identification of Merrill Klein as an arsonist was clearly relevant. Appellant Klein also contends that the district court erred in admitting a letter in evidence which had been written by a government witness to himself setting forth the details of the conspiracy. *United States v. Walsh,* 305 F.2d 821 (6th Cir.), *cert. denied,* 371 U.S. 876 (1962), cited by Klein is inapposite. The decision to admit or exclude evidence is within the discretion of the trial judge and we perceive no abuse of discretion in the rulings complained of.

APPEAL OF JAMES E. FIFE (No. 76-1366)

Appellant Fife argues that he was prejudiced by the fact that a co-defendant, Ivan Marra, pled guilty during the trial and that the court advised the jury of this occurrence. Upon first receiving the guilty plea of Marra the court merely advised the jury that something had transpired which made it necessary for Marra and his counsel to be present and that he was no longer involved in the case. Thereafter, counsel for appellant Klein requested the court to instruct the jury of the reason for Marra's withdrawal. Counsel for Fife objected and moved for a mistrial when the court announced that the jury would be informed and instructed that no inferences could be drawn from Marra's guilty plea in their consideration of the charges against Klein

and Fife. The court did then advise the jury of Marra's guilty plea and gave a comprehensive instruction that the jury should draw no inferences with respect to the case against the remaining defendants and that the guilty plea would in no way influence them in the decision which they would be required to make with respect to the other two defendants.

Fife relies primarily upon *Payton v. United States,* 222 F.2d 794 (D.C. Cir. 1955), in which it was held prejudicial error for the court to receive a guilty plea in the presence of the jury and then emphasize this fact as the trial proceeded. The court of appeals pointed out that it was particularly prejudicial because the evidence showed a close association between the co-defendant who had pled guilty and the defendant whose trial continued. So far as may be ascertained from reading the reported decision, the trial court in *Payton* did not give a corrective instruction to the jury as was done in the present case. In *United States v. Kimbrew,* 380 F.2d 538 (6th Cir. 1967), the court held that it was no error to permit a co-defendant to change his plea from not guilty to guilty in the presence of the jury, though the reviewing court must be sensitive to any aggravating circumstances. In *Kimbrew* there was no request for a corrective instruction and the conviction was affirmed.

Fife argues that there were aggravating circumstances in the present case in that testimony had linked Marra and Fife as business associates and they had been described as being together about one week before the fire. On the other hand, we do not have the aggravating circumstance found in *Payton* of several references by the court to the guilty plea without instructing the jury that it was not to draw any inferences from this development. We believe the Fifth Circuit articulated

the proper test in *United States v. Baete,* 414 F.2d 782, 783 (1969), where it stated that in cases such as this the appellate court should focus its attention carefully on "the sufficiency of the corrective instruction." This test is particularly applicable in the present case where one of the remaining codefendants requested the court to advise the jury of the guilty plea and the other objected. We have carefully examined the corrective instruction given by District Judge Bratcher and conclude that it was sufficient to remove any prejudice which might otherwise have flowed from the jury's knowledge of Marra's guilty plea.

Prior to trial, appellant Fife made a motion pursuant to Rule 16(c), Fed. R. Crim. P., for production of all documents and other tangible items in the possession, custody or control of the government which might be material to the preparation of the defense. This motion was granted, but the documents disclosed to the defendants did not include a bank signature card with reference to a deposit in a Cleveland, Ohio bank in the name of Marra Industries. An officer of the Cleveland bank appeared pursuant to a government subpoena and brought with him bank deposit statements and a signature card for the account of Marra Industries bearing the signatures of Ivan Marra and the appellant Fife. Fife objected to production of the signature card on the ground that the government had not produced it in compliance with the order under Rule 16. The court excluded the signature card at that time. When the witness was recalled later, the court permitted the signature card to be received in evidence. At this time the attorney for the government pointed out that copies of the card had been made available to the defense two days earlier.

Fife argues that so long as the bank official was only permitted to testify that the account has been opened the jury did not know that he, Fife, had any connection with the bank account, and that it was prejudicial to reveal this fact through admission of the signature card which had not been furnished prior to trial. We fail to see prejudice in the ruling of the trial court. Fife never denied that he was associated with Marra, but insisted that he made an investment in Marra Industries thinking that it was a legitimate business enterprise. Furthermore, there was direct evidence of Fife's association with Marra in addition to the fact that both had signed the signature card. There was no reversible error in the district court's handling of this matter.

Fife contends that his Sixth Amendment right to confront witnesses against him was infringed by the limitations which the district court placed on his cross-examination of the government witness, Joseph Laverich. Laverich was the only witness who implicated Fife in the burning of the bakery building, and Fife denied any involvement. Thus the jury had to make a credibility determination with respect to conflicting testimony of Fife and Laverich. *Cf. Smith v. Illinois,* 390 U.S. 129, 131 (1968). Fife argues that his cross-examination of Laverich was improperly restricted in two respects.

At the beginning of the trial, counsel for Fife requested an FBI "rap sheet" on Laverich. The government attorneys reported to Fife's counsel that it had been learned through a telephone call to Washington that the FBI did not have a rap sheet on the witness. Defense counsel was informed that the witness had two misdemeanor convictions, but no felony convictions. Near

the end of cross-examination of Laverich by counsel for Fife one of the prosecuting attorneys informed counsel and the court that a second telephone call to Washington had produced the fact that a rap sheet on Laverich was in existence. The government attorney had a handwritten copy of the contents of the rap sheet and this was shown to the District Judge and Laverich in chambers. Counsel for Fife was permitted to ask Laverich about each item on the handwritten sheet out of the presence of the jury. Laverich stated that he had not been convicted of a felony within ten years of the time of trial and that he was found innocent by a jury of a charge of attempted murder which was shown on the handwritten sheet. Counsel for Fife did not cross-examine Laverich further in the presence of the jury.

Prior to the above proceedings counsel for Fife had attempted to cross-examine Laverich extensively about the attempted murder charge upon which he had been acquitted. The district court sustained objections to such questions and counsel stated that he believed the Department of Justice Strike Force attorneys had assisted Laverich in winning an acquittal in the attempted murder case in order to induce him to testify against Fife in the present case. Counsel admitted that he had no information to this effect, but wanted to attempt to develop this theory. The district court permitted Fife's attorney to introduce a memorandum of understanding between Laverich and the prosecuting attorneys and required Laverich to read this memorandum to the jury. Laverich testified that he received immunity and was not named as a defendant in the case against Klein, Marra and Fife.

Fife was not prejudiced by the delay of the government in producing the "rap sheet." Furthermore, the District Judge did not abuse his discretion in sustaining objections to questions concerning a charge on which Fife had been acquitted by a jury. This case is totally unlike *Giglio v. United States,* 405 U.S. 150 (1972), where the prosecution failed to disclose to the jury the fact that the government had made a promise of leniency in return for the testimony of a key witness. The jury was fully informed as to arrangements between Laverich and the government, and Fife's attorney was free to argue inferences from the known facts. However, counsel for Fife was not entitled to harass the witness with questions about a serious charge upon which a jury had acquitted him, based on counsel's personal theory of an illegal agreement between the government and Laverich which is totally unsupported by the record.

The second, and more serious charge of prejudicial limitation of cross-examination relates to the residence address of Laverich. On direct examination Laverich testified that he lived in a residence in Greensburg, Pennsylvania and had lived there for two years at the time of the trial. The prosecuting attorney objected when counsel for Fife on cross-examination asked the residence address of Laverich in Greensburg, Pennsylvania, and the court sustained the objection. Immediately thereafter there was a bench conference at which counsel for Fife said that he needed the information to develop his cross-examination and for further investigation of Laverich. The government attorney stated, "This witness is apprehensive to tell it." The district court stated that he did not want to contribute to the apprehension of the witness and that the name of the town where

Laverich resided should be sufficient for cross-examination and investigation.

Counsel for Fife then conducted a detailed cross-examination during which Laverich testified that he was not in custody at the time of the trial, that he had participated in the burning of a hotel in Pennsylvania in 1968 or 1969 and in another arson case in Pittsburgh after the fire in Louisville. Furthermore, he testified that he had "burglarized places." He testified that he was employed at the time of the trial as a building contractor in Greensburg, Pennsylvania and that he had previously done work in electronics. During the conference between the court and the counsel after the "rap sheet" information was produced, Laverich stated under oath that the population of Greensburg, Pennsylvania is about 15,000.

Fife relies principally on *Alford v. United States,* 282 U.S. 687 (1931), and *Smith v. Illinois,* 390 U.S. 129 (1968). *Alford* establishes the rule that counsel for a defendant is not required to show, or even know, what he expects to prove on cross-examination. Cross-examination, particularly where the purpose is to disclose bias or prejudice on the part of a witness, is necessarily of an exploratory nature. The Supreme Court held that it was error for a trial court to sustain an objection to a cross-examiner's question seeking to elicit the address of a government witness in a criminal prosecution. Mr. Justice Stone wrote for the Court, "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise him." 282 U.S. at 692.

In *Smith v. Illinois,* 390 U.S. 129 (1968), a government witness admitted on cross-examination that he had

given a fictitious name on direct examination. The trial court sustained objections to cross-examination questions concerning his real name and his residence address at the time of the trial. Pointing out that the identity and residence of a witness are basic information the Court stated, "The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself." *Id.* at 131. The present case is distinguishable in some respects from *Smith v. Illinois* in that the witness gave his true name, the town where he lived and worked and his occupation.

The mere expression of apprehension by a witness who is reluctant to divulge his address is not sufficient justification for restricting cross-examination without further inquiry. An *in camera* hearing might be held to determine if there is a factual basis for such apprehension. The district court should have conducted such an inquiry in the present case. However, information which was brought out in the otherwise unrestricted cross-examination of Laverich revealed that he had lived in a town of approximately 15,000 population for a period of at least two years where he was engaged as a self-employed building contractor. Thus the only information the witness was allowed to withhold was his street address in a relatively small community.

Though convictions were reversed by the Supreme Court both in *Alford v. United States* and *Smith v. Illinois,* the Court did not lay down a *per se* rule that a witness must always be required to give his residence address. In *Alford* the Court affirmed that the extent of cross-examination with respect to any permitted subject

is always within the sound discretion of the trial court. 282 U.S. at 694. We believe that under the circumstances of this case, counsel for Fife had the opportunity "to place the witness in his proper setting . . . ." *Id.* at 692. As the court pointed out in *United States v. Alston,* 460 F.2d 48, 51 (5th Cir.), *cert. denied,* 409 U.S. 871 (1972), the purpose of *Alford and Smith* is achieved if sufficient evidence is admitted to identify the witness and locate him in his usual environment. The cross-examination which was permitted in the present case produced this information.

The critical importance of cross- examination in our adversary system of justice has been affirmed many times. The necessity of permitting great latitude in cross-examination where the purpose is to show bias or motive of a witness to testify falsely has been recently reiterated by the Supreme Court and this court. *See Davis v. Alaska,* 415 U.S. 308 (1974); *United States v. Garrett,* —— F.2d —— (6th Cir. No. 76-1108, decided September 29, 1976); *United States v. Baker,* 494 F.2d 1262 (6th Cir. 1974). However, an examination of the entire transcript of the testimony of Laverich reveals an extensive and productive cross-examination, and we conclude that the district court did not commit prejudicial error.

Both judgments of conviction are affirmed.

Appendix B.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA
Plaintiff-Appellee
v.
ALVIN KLEIN
Defendant-Appellant

No. 76-1367

Filed Jan. 26, 1977, John P. Hehman, Clerk

BEFORE: PHILLIPS, Chief Judge; MCCREE and LIVELY, Circuit Judges.

ORDER

Upon consideration of the petition for rehearing filed herein by the defendant- appellant, Alvin Klein, the court concludes that the issues raised therein were considered upon submission of this appeal following oral argument and that rehearing is not required.

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

JOHN P. HEHMAN,
Clerk

Appendix C.

APPENDIX C

Certificate of Service

Petitioner, Alvin Klein, by his attorneys, Thomas A. Livingston, Esq., and Dennis J. Clark, Esq., hereby certify that the within Petition for Writ of Certiorari has been forwarded by mail for filing to the Clerk of the Supreme Court of the United States in Washington, D.C., and that a true and correct copy of said Petition has been forwarded by mail to the Office of the Solicitor General of the United States, Department of Justice, Washington, D.C.

THOMAS A. LIVINGSTON, ESQ.
DENNIS J. CLARK, ESQ.

Attorneys for Petitioner
